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Desert Power, L.P. v. Public Service Commission of Utah : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

Desert Power, L.P., Petitioner, vs. Public Service Commission of Utah, Respondent.	Appeal No. 20061111 – CA Public Service Commission Docket No. 04-035-04

REPLY BRIEF OF PETITIONER

On Appeal from a Final Order
of the Public Service Commission of Utah

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ORAL ARGUMENT REQUESTED

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Petitioner Desert Power, L.P. ("Desert Power"), through its counsel of record, submits this Reply Brief in Support of its Petition for Review.

ARGUMENT

I. INTRODUCTION

Before this Court for review is the Public Service Commission of Utah's ("PSC") misinterpretation of the force majeure provision of the Power Purchase Agreement ("PPA") between PacifiCorp and Desert Power.[1] The facts critical to making that determination are undisputed, leaving only a question of law for this Court to consider.

In their Response Brief, the PSC and PacifiCorp argue that Desert Power failed to preserve any questions of facts, but under the circumstances of this case, that is neither necessary nor possible. The only findings the PSC and PacifiCorp could muster on force majeure from the PSC's September 20, 2006 Order are three conclusory statements by the PSC. (Response Brief at pp. 12-13.) As to the first two, which are actually a single conclusion that the parties jointly had difficulty timely meeting milestones, whatever the merits of the conclusion, the simple fact is that the record demonstrates that prior to October 20, 2005, (and not even then), no one at PacifiCorp ever suggested to Desert Power that the interconnection modifications could not be completed within a timeframe

[1] Although the PSC and PacifiCorp appear to raise an issue as to whether the force majeure issue was before the PSC (Response Brief at p. 10), it is clear from the record (*e.g.*, R-145 September Tr. at pp. 9-10) as well as the PSC Order itself that the matter was fully before it and considered and decided by it.

consistent with the requirements of the PPA for Desert Power's expanded plant to be online.

The third claimed finding is what the PSC and PacifiCorp call an "implicit" finding putatively contained in the conclusory statement in the Order that "...that none of the matters Desert Power complains of are force majeure events." (R-117 at p.6.) However, the "implicit" finding demonstrates that the claimed findings, in fact, are totally inadequate. If anything, the "implicit" finding supports Desert Power's position that this case only presents a question of law. As shown by the conclusory statement that putatively contains the "implicit" finding, in rejecting Desert Power's claim that a force majeure event had occurred, the PSC accepted as undisputed the matters of which Desert Power complained. Desert Power complained that PacifiCorp's unilateral redesign of its interconnection with Desert Power and the resultant delays, notwithstanding Desert Power's diligent efforts to overcome the delays, constituted an event of force majeure. The only question then is whether these events triggered the force majeure provisions of the PPA, and that involves the legal correctness of what the PSC did, not the resolution of disputed facts. Without expertise or experience with force majeure, the PSC's decision is due no deference by this Court and should be reversed.

II. THE RELEVANT FACTS TO FORCE MAJEURE ARE LIMITED AND UNDISPUTED

A. Desert Power's Statement of Facts Focuses on Facts Relevant to the Issue Presented for Review

Rule 24(a)(7) of the Utah Rules of Appellate Procedure requires that a Petitioner's brief include "a statement of the facts relevant to the issues presented for

review...." The only issue Desert Power presents for review in its brief is the PSC's misinterpretation of Section 13, the force majeure provision of Desert Power's Power Purchase Agreement ("PPA") with PacifiCorp.

Unlike the PSC and PacifiCorp's statement of facts in their Response Brief, Desert Power's statement focuses solely on the points that are material, relevant, and critical to determining whether an event of force majeure occurred pursuant to the terms of PPA. Those facts are as follows: 1) the PPA between PacifiCorp and Desert Power has a force majeure provision, the sole subject of Section 13 of the PPA (R-48); 2) from February 2005 to October 2005, PacifiCorp and Desert Power used the original substation and interconnection design in planning the interconnection of the expanded Desert Power plant to the PacifiCorp transmission system (*See e.g.*, R-82 Swenson testimony at pp. 3-6, R-145 September Tr. at pp. 14, 124-125); 3) on October 19, 2005, PacifiCorp unilaterally changed the design of the interconnection (*See e.g.*, R-82 Swenson testimony at p. 4; R-84); 4) the new interconnection redesign meant that the timeline for equipment acquisition, including long-lead time items, would be significantly extended (*See e.g.*, R-145 September Tr. at pp. 14-16, 237-239); 5) without the change in design and long-lead times, Desert Power would have been able to achieve commercial operation within the time allowed under the PPA (*See e.g.*, R-145 September Tr. at pp. 15, 41-42, 44-47, 152-154); 6) Desert Power sought to mitigate the impact of the redesign by undertaking, at its own risk, to order those long lead-time items even though that was not its responsibility under the PPA, but Desert Power still could not mitigate the resulting adverse impact on the schedule, which was worsened by PacifiCorp's delay in issuing the interconnection

study (*See e.g.*, R-145 September Tr. at pp. 15-16, 150-153, R-82 Swenson testimony at pp. 5-6, R-86); and 7) the change in design and resulting long-lead times were beyond the control of Desert Power and which PacifiCorp was powerless to remedy notwithstanding its efforts (*See e.g.*, R-145 September Tr. pp. 14-15, 247-248).

These facts are all set out in the record of this case and are undisputed. And it is these undisputed facts that demonstrate that under the unambiguous terms of Section 13 of the PPA, there was an event fully constituting a force majeure event.

B. Respondent Public Service Commission ("PSC") and PacifiCorp Raise Several Issues in Their Response Brief that are Either Mischaracterized as Disputed, Irrelevant to the Issue of Force Majeure, False, or Attempt to Diffuse the Focus of this Case

The PSC and PacifiCorp raise numerous issues as alleged facts in their Response Brief that are mischaracterized as disputed, give false impressions, and are not relevant to whether or not PacifiCorp's change in design and the resultant long-lead times for equipment required for the new design were an event of force majeure. On pages 32 through 35 the PSC and PacifiCorp enumerate four facts they claim are disputed which include: 1) alleged delays attributed to Desert Power in seeking interconnection with PacifiCorp; 2) the timing of Desert Power's acquisition of a steam turbine and generator set ("STG"); 3) the alleged "requirement" of firm gas transportation for the Desert Power plant; and, 4) Desert Power's requirement to execute a steam contract with a steam host. As shown below, these facts are not germane to the issue of force majeure in this case.

When Desert Power requested interconnection is uncontested. When Desert Power acquired the STG is uncontested as well, but that date was long after Desert

Power's request for interconnection, which included the specifications for the STG ultimately acquired.[2] However, the central and dispositive fact is that until the change in the interconnection design, there is absolutely no contention that PacifiCorp ever informed Desert Power that it could not meet the in-service date.[3] Thus, the interposition of the assertions is not germane to the issue of whether a force majeure event occurred under the terms of the PPA. The fact is that Desert Power was on schedule to complete the plant expansion within the scope of the PPA had PacifiCorp not changed the interconnection design in October 2005. Any other action that could have been done before the change in design is speculative and irrelevant.

In addition, PacifiCorp's claim of delay between January 2004 when Desert Power filed its petition for PSC approval of a PPA and June 2004 when PPA negotiations between Desert Power and PacifiCorp began is disingenuous. (Response Brief at p. 32.) Desert Power had filed with the PSC a PPA it was prepared to sign when it sought pricing for a qualifying facility ("QF") in January 2004. There simply were no negotiations until after the PSC set the pricing for QFs.

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[2] In its opening brief (pp. 7-8) Desert Power describes its five-month effort to acquire the correct STG. The search had nothing to do with lack of financing as the PSC and PacifiCorp claim (Response Brief at pp. 33-34); it was just difficult to find the generator set with the necessary specifications. Indeed, the specifications for the proposed steam turbine and generator set, and the fees charged by PacifiCorp for undertaking the interconnection process, were provided to PacifiCorp long before Desert Power had its financing.

[3] Indeed, when Desert Power first contacted PacifiCorp's transmission group about the proposed expansion in June 2004 with a proposed in-service date in January of 2006, they expressed appreciation for the "head's up" so early because they normally did not have such a long advance notice. (R-145 September Tr. at p.12.)

But that is all a sideshow designed to divert attention from the central fact here: until the change in interconnection design, all parties were working toward a timely completion and start-up of the Desert Power facility within the timeframe of the PPA, and the PSC and PacifiCorp make no contention to the contrary.

The third claim the PSC and PacifiCorp make is that Desert Power had to have firm gas transportation for its gas supply. (Response Brief at p. 34.) One must assume – for the point is never specified in the Response Brief – that their contention is that without such transportation, the PPA terms would not have been met. This claim is false. Bruce Griswold, a PacifiCorp witness, admitted under cross examination that the PPA does not require firm transportation. (R-145 September Tr. pp. 180-81.) The PPA only requires that Desert Power make "commercial [sic] reasonable" efforts to obtain the gas necessary to operate the plant and deliver power to PacifiCorp. (R-48 Section 7 at p. 16.) Desert Power had executed a gas supply agreement with IGI Resources and a transportation agreement with Questar as Company. Thus, it had its gas requirements already in place. (R-150 Darling testimony proprietary Ex. 1.10.)[4]

The fourth and final point the PSC and PacifiCorp raise in their Response Brief is that at the time of the hearing, Desert Power did not have a steam contract in place to sell the steam from its plant as required for QFs like Desert Power's. (Response Brief at p. 35.) Desert Power had a final draft ready for execution with US Magnesium. However, an executed steam contract would have had no impact on PacifiCorp's decision to change

[4] If Desert Power could not provide power when PacifiCorp dispatched the plant, the damage provisions in the PPA would then take effect to keep PacifiCorp and its customers whole.

the interconnection design. Neither would it have shortened any of the resulting equipment delays resulting from the interconnection redesign effected by PacifiCorp. Nor do the PSC and PacifiCorp contend to the contrary on either point. Rather, it is just one more irrelevant fact interposed to divert attention from the controlling, undisputed facts in this case: that the interconnection redesign constituted a force majeure event under the PPA because its occurrence prevented the plant from being physically completed and ready for operations within the time allowed under the PPA.

III. THE FORCE MAJEURE PROVISION OF THE PPA IS NOT AMBIGUOUS, NO ONE RAISED THAT ISSUE BEFORE THE PSC, AND IT CANNOT NOW BE RAISED FOR THE FIRST TIME ON APPEAL

A. Section 13 of the PPA, the Force Majeure Provision, Is Not Ambiguous

As Desert Power stated in its opening brief, Section 13 of the PPA is clear and unambiguous: "As used in this Agreement, 'Force Majeure' or 'an event of Force Majeure' means any cause beyond the reasonable control of the Seller or of PacifiCorp that, despite the exercise of due diligence, such party is unable to prevent or overcome." The examples in the list that follow thereafter are just that, examples, and the list is not limited by the events specifically enumerated, as Section 13.5 pointedly demonstrates.

PacifiCorp's unilateral redesign of the interconnection and the consequent delays in obtaining the new equipment required by the change meet the definition of an event of force majeure under the PPA. In its opening brief, Desert Power cited Section 13.5 which shows that both parties to the PPA explicitly considered delays caused by long-lead times and the unavailability of parts to be events of force majeure (p.12). That is a clear and important example in the PPA that the PSC and PacifiCorp noticeably ignored

in their brief even though it has direct application to this case. Desert Power's reliance on Section 13.5 also shows that, the claims of the PSC and PacifiCorp to the contrary notwithstanding, Desert Power relied on provisions of Section 13 other than Section 13.1 to establish that it encountered an event of force majeure. (Response Brief at p. 27.) While Section 13.1 sets out the definition of force majeure, the entire Section 13 is the force majeure provision of the PPA.

Rather than deal with Section 13 5, the PSC and PacifiCorp strain to come up with alternative interpretations of other subsections of Section 13 in support of their position, which are completely implausible. They claim, for example, that it would make no sense for a party who caused an event of force majeure to be excused from performance under Section 13.2. (Response Brief at pp. 28-29.) That section only excuses a party "...from whatever performance is affected by the event of Force Majeure," not from performance that is **not** affected by the event of force majeure. If the delays caused by the long-lead times for equipment required by the new design affected any part of PacifiCorp's performance, they would be relieved until the equipment arrived. That is not difficult to understand. How it follows from that that a party who caused the force majeure event would escape the obligations that arose before the event is incomprehensible. (Response Brief at p. 29.) Section 13.3 makes inescapable any earlier obligations no matter the cause of the event of force majeure, and there is no other way to read that section. The PSC and PacifiCorp's interpretation mischaracterizes Sections 13.2 and 13.3; such misinterpretation should, therefore, be disregarded by this Court.

In addition, the PSC and PacifiCorp's strained and incorrect interpretation does not somehow make the plain language of the PPA ambiguous. Watson v. Hatch, 728 P.2d 989, 990 (Utah 1986), ("The language of the contract is plain and is not rendered ambiguous by the fact that the parties urge different interpretations of it.") *See also* Valentine v. Farmers Insurance, 141 P.3d 618, 621 (Utah App. 2006). There is no ambiguity in Section 13 of the PPA, so the plain meaning of the unambiguous language controls, and that language should be interpreted as a matter of law. Webbank v. American Annuity Service Corp., 54 P.3d 1139, 1145 (Utah 2002).

B. The Issue of Whether the PPA is Ambiguous Was Never Raised Before the PSC and May Not be Raised for the First Time on Appeal

For the first time on appeal, the PSC and PacifiCorp raise a claim effectively that the force majeure provisions may be ambiguous and this Court, sua sponte, should undertake an examination of whether the force majeure provisions should be deemed ambiguous. They then claim that Desert Power failed to preserve any of its ability to argue factual issues if the Court, sua sponte, determines that the contract is ambiguous. Notably, for all the argument, the PSC and PacifiCorp never claim that the clause is, in fact, ambiguous.[5] Rather, they only suggest that this Court on its own sua sponte examination might find it so.

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[5] The nearest that the PSC and PacifiCorp can come to an assertion that an ambiguity may exist is the statement contained at pp. 29-30 of their Response Brief that: "[a]t best, the singular use of 'party' in section 13.1 raises an ambiguity." The use of the words "at best" demonstrates that the claim constitutes a stretch even for the PSC and PacifiCorp. More importantly, it is clear from the next sentence that PSC and PacifiCorp are not themselves making the argument but are simply arguing that Desert Power is precluded from making such an argument.

For the Court to do that at this stage would be overwhelmingly prejudicial to Desert Power. If a provision of a contract is ambiguous, the Court would have to review extrinsic evidence to determine the intent of the parties. Id. No such evidence was adduced in the proceeding before the PSC because there was no claim of ambiguity. It is not clear how the Court would proceed now. That is why an assertion that a contract provision is ambiguous should be raised before the trier of fact.

In addition, in Carrier v. Salt Lake County, 104 P.3d 1208, 1219 (Utah 2004), the Utah Supreme Court stated: "[A]s a general rule we decline to address issues raised for the first time on appeal." If the issue is not raised in the proceeding below, it is not preserved for appeal. Id. No one asserted that Section 13 of the PPA was ambiguous, nor did the PSC in its Order even raise the issue. Indeed, one can search the entire record without finding the words ambiguous, ambiguity, or vague even once mentioned, including in the pre-filed testimony of PacifiCorp's three witnesses. PacifiCorp did not preserve the issue for appeal in a petition to the PSC for reconsideration. How Desert Power could have raised, as a hypothetical issue, the ambiguity of the force majeure provisions when it believed they were unambiguous, no one had contended to the contrary, and the PSC never claimed in its Order that the provisions were ambiguous is never explained by the PSC and PacifiCorp.[6] (Response Brief at p. 25 claiming waiver of argument on ambiguity.)

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[6]Indeed, the only claim as to ambiguity interposed by the PSC and PacifiCorp is tautological: they claim if this Court should determine that the unambiguous language of the provision does not support the PSC's Order then in that event, "the contract is at least

C. The PSC's and PacifiCorp's Improper Attempt to Raise Ambiguity Does Not Create a Question of Fact

In addition to their improper attempt to raise the issue of ambiguity for the first time on appeal, PacifiCorp and the PSC tried to use the possibility of ambiguity of the force majeure provision of the PPA to claim that a question of fact exists.

> However, in the event the Court were to find the force majeure provision to be ambiguous, a question of fact would be raised regarding the proper interpretation of the contract....As argued below, the PPA unambiguously supports the Commission's interpretation. However, if not unambiguously in support of the Commission's interpretation, the contract is at least ambiguous.

(See Response Brief at pp. 24-25)

PacifiCorp and the PSC cannot bootstrap a question of fact into this case with an issue not preserved for appeal and, therefore, not properly before this Court. Desert Power recited undisputed facts in its opening brief and in this brief in support of the intended interpretation of the force majeure provision of the PPA. There is no basis, legal or factual, for this argument, and the Court should reject it.

IV. THE PSC'S INTERPRETATION OF THE PPA PRESENTS A QUESTION OF LAW FOR WHICH THIS COURT GIVES NO DEFERENCE FOR THE PSC'S DECISION

A. Undisputed Facts Applied to an Unambiguous Contract Presents a Question of Law for the Court to Review

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ambiguous" and Desert Power, having failed to assert issues of fact, must lose on appeal. The bottom line for the PSC and PacifiCorp is that the language is unambiguous unless it does not support the PSC's Order, in which case the provision must be deemed ambiguous and the PSC's Order sustained. Of course, the PSC and PacifiCorp proffer no basis for construing the language as ambiguous other than their "heads I win, tails you lose" approach to seeking an affirmance of the PSC's Order. This attempt to eviscerate this Court's review should be summarily rejected.

On appeal, the standard of review for decisions in which administrative agencies interpret contracts is correctness, and the reviewing court gives little or no deference to the agency's decision. Utah Chapter of the Sierra Club v. Utah Air Quality Board, 148 P.3d 960, 965 (Utah 2006). As demonstrated above, Section 13 of the PPA is unambiguous and the critical facts in determining whether PacifiCorp's change in Desert Power's interconnection design and the consequent delays are undisputed. There are no questions of fact for the Court to review.

B. The PSC Has No Experience or Expertise to Interpret the PPA or to Decide the Legal Principle of Force Majeure

Even if this Court were to determine that the correct standard of review were that required for a mixed question of law and fact, it would give the PSC's decision little to no deference. First, as noted several times before, interpreting a contract presents only a question of law. Webbank v. American Annuity Service Corp., *Supra*. Second, on the question of force majeure, the PSC has no expertise or experience with this legal principle and is not in a better position than this Court to assess the law or to determine whether the events that Desert Power encountered were events of force majeure under the PPA. Utah Chapter of the Sierra Club v. Utah Air Quality Board, *Supra*.

In the two cases on which the PSC and PacifiCorp relied to argue that substantial evidence and reasonableness are the appropriate standard for review of their claimed fact components of this proceeding, the PSC's experience, expertise and position were the very considerations the Utah Supreme Court gave for deferring to the agency's decision. In Westside Dixon Associates LLC v. Utah Power & Light Company, 44 P.3d 775, 778

(Utah 2002), the Court said, "These issues are governed by reasonableness standard, in view of the fact that the Commission, 'by virtue of its experience or expertise, is in a better position than the courts to give effect to the regulatory objective to be achieved.'" (Citation omitted.) In distinguishing the reasonableness standard from the correction-of-error standard in WWC Holding Co., Inc. v. Public Service Commission, 44 P.3d 714, 718 (Utah 2002), the Court stated that the correction-of-error standard "...is especially appropriate where the agency possesses no special expertise which would place it in a better position than the court to decide the issue." (Citation omitted.) The PSC has no special expertise or experience with force majeure and its decision should not establish the legal principle of force majeure or determine how a force majeure contract clause operates in the state of Utah.

C. The Decision of an Administrative Agency Deciding a Legal Principle is a Question of Law

In deciding the standard of review for a decision of an administrative agency on the legal doctrine of standing in Utah Chapter of the Sierra Club v. Utah Air Quality Board, 148 P.3d 960, 966 (Utah 2006), the Utah Supreme Court differentiated between decisions of a trial court and decisions of an administrative agency. The Court stated:

> However, the Board's status as an administrative agency rather than a lower court does influence our classification of standing as a question of law in this case. In the non-administrative law context, standing would generally be considered a "mixed question" because it involves the application of a legal standard to a particularized set of facts. For example, when reviewing a lower court's standing determination we have stated that "the question of whether a given individual or association has standing to request a particular relief is primarily a question of law, although there may be factual findings that bear on the issue." Kearns-Tribune Corp. v. Wilkinson, 946 P.2d 372,373 (Utah 1997). Nevertheless, in the

> administrative law context, standing is a "general question of law" because it is a judicial doctrine. As a court, we are in a better position than an agency to determine whether this doctrine has been properly interpreted and applied, just as we are in a better position to review questions of constitutional and statutory interpretation.

The Court also gave no deference to the agency's decision "...because standing is not within the Board's area of expertise. That the Board has been assigned some adjudicative functions does not implicitly give it any particular authority to interpret standing doctrine or other issues of general statutory, constitutional, or common law." Id. Likewise, this Court should give no deference to a PSC decision on force majeure when that agency has no experience with or special expertise for making that decision.

D. The PSC's and PacifiCorp's Argument that Desert Power's Petition for Review Requires that the Evidence Must be Marshaled is Wrong

As stated several times before, Desert Power's petition in this case is for review of the PSC's misinterpretation of the PPA and presents only a question of law. As an administrative agency, an appellate court gives the PSC's decision on a legal principle like force majeure no deference, particularly when the agency has no expertise or experience with the legal principle. Finally, undisputed facts applied to an unambiguous contract leaves only a question of law for this Court to decide.

Even if the PSC's and PacifiCorp's argument that Desert Power must challenge findings and marshal evidence were to have merit, either there were no decipherable findings, or they were unclear, inadequate, and conclusory based on an errant interpretation of the PPA and, therefore, reviewable as a matter of law. Even the PSC's and PacifiCorp's Response Brief refers to the PSC's findings as conclusions. (See

Response Brief pp. 12, "The Commission's conclusions on force majeure, however, were not revisited in later orders.") In its September 20, 2006 Order the PSC concluded as follows on the issue of force majeure:

> PacifiCorp and the Division argue that whatever difficulties have occurred in efforts to bring the QF online, **they are not force majeure events as that term is used in the PPA.** These parties argue that the delays and difficulties that have been experienced result from the decisions and actions PacifiCorp and Desert Power themselves made in the course of their efforts to develop the QF, **not from an outside source beyond the control of Desert Power or PacifiCorp.** PacifiCorp argues that Desert Power's position is essentially attempting to vet what could be viewed as a breach of contract as a force majeure. PacifiCorp further argues that Desert Power's position is far too broad, elevating any difficulty a party may have to be a force majeure event. Relative to PacifiCorp's conduct and actions, Desert Power's witnesses concede that they are in no violation of any contractual, statutory or tariff term or standard. We agree with the positions of PacifiCorp and the Division that none of the matters Desert Power complains of are force majeure events.

September 20, 2006 Order pp. 5-6 (emphasis added). It is clear from this statement that the PSC's conclusions were based on a narrow, incorrect interpretation of the contract. There are no clear factual determinations, however, from which to determine how the PSC reached its conclusions, making a challenge by Desert Power difficult if not impossible.

The only clear statement in all of this is "... that none of the matters Desert Power complains of are force majeure events." Thus, even after taking the assertions of Desert Power as true, the PSC concluded there was no triggering of the force majeure clause of the PPA. As previously set out, however, taking all those allegations as true, there was a clear triggering of the express provisions of the force majeure clause, and the PSC was in error to conclude otherwise.

In Milne Truck Lines, Inc. v. Public Service Commission, 720 P.2d 1373, 1378 (Utah 1986), the Utah Supreme Court said that with respect to findings:

> The Commission cannot discharge its statutory responsibilities without making findings of fact on all necessary ultimate issues under the governing statutory standards. It is also essential that the Commission make subsidiary findings in sufficient detail that the critical subordinate factual issues are highlighted and resolved in such a fashion as to demonstrate that there is a logical and legal basis for the ultimate conclusions. The importance of complete, accurate, and consistent findings of fact is essential to a proper determination by an administrative agency. To that end, findings should be sufficiently detailed to disclose the steps by which the ultimate factual conclusions, or conclusions of mixed fact and law, are reached. *See generally, Rucker v Dalton, 598 P.2d 1336, 1338 (Utah 1979).* Without such findings, this Court cannot perform its duty of reviewing the Commission's order in accordance with established legal principles and of protecting the parties and the public from arbitrary and capricious administrative action.

The Court criticized the PSC again for having poor or no findings in MCI v. Public Service Commission, 840 P.2d 765 (Utah 1992) emphasizing that every rate adjustment must be predicated on a finding that the adjustment is just and reasonable, and "[i]n turn, this finding must be supported by substantial evidence concerning **every significant element in rate making components** (expense or investment) which is claimed by the applicant as the basis to justify a rate adjustment." Id. at 773 (emphasis added). Of significance is that in MCI, the Court cited Milne approvingly and reiterated that if the PSC did not make findings on every ultimate and subordinate issue of fact, the Court could not properly review the decision. Id. at 774. Apart from the significance of the requirement for clear findings itself, the Court decided MCI after Utah Code Ann. § 63-46b-16(4)(g) was in effect which established the standard of review when an agency makes determinations of fact. It would be this section on which the PSC and PacifiCorp

relied to claim that the PSC's conclusory findings, including the implicit finding, meet the Court's requirement that the PSC make findings on every ultimate and subordinate issue of fact. The findings simply are not adequate for this Court to do a proper review. Id. What is clear is that the PSC relied on the undisputed facts of which Desert Power complained to determine there was no event of force majeure, which leaves this Court with only a question of law to decide.[7]

After Desert Power filed its opening brief in this proceeding, the Utah Supreme Court issued Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-day Saints, --- P.3d ---, 2007 WL 1452840, 2007 UT 42, Utah, May 18, 2007, reversing and remanding this Court's decision on the issue of the appropriate standard of review for factual determinations of the Labor Commission of Utah. The case involved a petition for permanent total disability filed at the Labor Commission. The Supreme Court reversed this Court's review of the Labor Commission's findings that was based on abuse of discretion on grounds that the appropriate standard was a substantial evidence standard. Id. at ¶¶ 10, 38-39. The Court said that this Court "... improperly reweighed the Commission's factual determinations under the guise of reviewing the application of facts to law." Id.

[7] Desert Power acknowledges that § 63-46b-16(4)(g) refers to "... a determination of fact, made or implied by an agency...", but if conclusory statements strewn through an order and implicit findings inferred from conclusory statements meet the standard, then there is no standard. Any judicial review of such a standard would be subjective and unpredictable, and any challenge by a party would be an exercise in futility. Since Desert Power's challenge presents only a question of law, however, this Court does not face this issue.

Martinez is distinguishable from this case, however, because the Labor Commission was addressing a subject specifically entrusted to it by the legislature. The petition for permanent total disability was squarely within the Labor Commission's jurisdiction. Under that circumstance, assuming the findings were otherwise adequate, the Supreme Court held that an appellate court should defer to the Commission's findings pursuant to Utah Code Ann. § 63-46b-16(4)(g); the Commission has expertise in and experience with the subject area and is therefore in a better position to make the determinations of fact.

That is not true in this case. The PSC's interpretation of the PPA presents only a question of law for which there is no deference and it has no experience with or expertise in determining what events constitute an event of force majeure. On that basis, the Martinez case is inapplicable.

The Martinez case made other important points that could have some bearing on the PSC's and PacifiCorp's arguments in their Response Brief. First, the Court made clear that when an agency's findings of fact are so inadequate that they cannot be meaningfully challenged as factual determinations, marshaling of evidence is not required. Id. at ¶ 13. As Desert Power has shown, the PSC's findings are irredeemably inadequate and as a result, unchallengeable. Second, the marshaling requirement is not a substantive rule of law and does not limit the discretion of the appellate court to review the record. Id. at ¶¶ 19, 20. It is only a tool for the Court and not marshaling the evidence is not automatically fatal to an appeal as the PSC and PacifiCorp argue. Third, and finally, once again on the issue of deferring to an agency decision the Court stated:

"Our conclusion is also consistent with the principle that grants of discretion to administrative agencies should be limited to those issues on which the agencies have "special experience or expertise placing [them] in a better position than the courts to construe the law." [Citation omitted.] Id. at ¶ 45. There simply is no basis on which to defer to the PSC's decision on the PPA or the issue of force majeure with which it has no experience or expertise.

IV. CONCLUSION

The dispositive facts relevant to resolving whether there has been a force majeure event under the unambiguous terms of Section 13 of the PPA are unchallenged. The PSC's Order itself accepts that those facts, as asserted by Desert Power, can be examined as unchallenged for purposes of determining whether the force majeure provisions of the PPA have been properly invoked. An examination of the unambiguous terms of Section 13 demonstrates that Desert Power properly invoked the force majeure provisions.

Accordingly the PSC's Order should be reversed. and this Court should enter an order and judgment finding that a force majeure event occurred as a matter of law.

Respectfully submitted this 20th day of June, 2007.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a member of and/or employed by the law firm of CALLISTER NEBEKER & McCULLOUGH, 10 East South Temple, Suite 900, Salt Lake City, Utah 84133, and that two (2) true and correct copies of the foregoing REPLY BRIEF OF PETITIONER were caused to be served upon the following by depositing properly addressed envelopes containing the same in the U.S. Mails, postage prepaid thereon, this 20th day of June, 2007.

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